Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MARK D. GREENBERG, MALCOLM A. SMITH, and HUGO TORBET,

Petitioners,

vs.

THE STATE BAR OF CALIFORNIA and THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal First Appellate District, Division Five

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this petition stem from this Court's decision in *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), in which it was held that the First Amendment prevented the state bar from using the fees of dissenting members to finance political or social activities not germane to the practice of law. (*Id.*, at 14-15.) The instant case concerns not only exactions of money but also of time, in that the State Bar of California, as part of its Mandatory Continuing Legal Education (MCLE) requirements, demands one hour in classes on the "elimination of bias from the legal profession" and one hour in "the prevention, detection, and treatment of substance abuse and emotional distress". The questions these requirements raise are

1. Does the First Amendment freedom of association, and the penumbral rights of privacy, guarantee the right to refuse compulsory attendance in classes not germane to the practice of law?

2. If so, are the compulsory classes in question germane to the practice of law?

3. If so, are compulsory classes the least restrictive method of advancing the legitimate interests of the bar association in the area of elimination of bias in the legal profession, and in the area of curtailing substance abuse and emotional distress?

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OPINIONS BELOW

The decision of the California Court of Appeal, First Appellate District, affirming judgment in favor of respondents appears here at Appendix, pages 1-8 in slip form. However, the reporter citation is: *Greenberg* v. *State Bar of California*, 78 Cal.App.4th 39, 92 Cal.Rptr.2d 493 (2000). The unreported order by the Court of Appeal denying petition for rehearing appears here at Appendix, page 9. Finally, the unpublished order of the California Supreme Court denying discretionary review appears at Appendix, page 10.

JURISDICTIONAL STATEMENT

The order by the California Supreme Court denying petition for review in this case was filed on April 26, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257.

LEGAL PROVISIONS INVOLVED

U.S. Constitution, Amendment 1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment 14: " . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . . "

California Business and Professions Code section 6070, subdivision (a):

> (a) The State Bar shall request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer a mandatory continuing legal education program. The rule that the State Bar requests the Supreme Court to adopt shall require that, within designated 36-month periods, all active members of the State Bar shall complete at least 25 hours of legal education activities approved by the State Bar or offered by a State Bar approved provider, with four of those hours in legal ethics. A member of the State Bar who fails to satisfy the mandatory continuing legal education requirements of the program authorized by the Supreme Court rule shall be enrolled as an inactive member pursuant to rules adopted by the Board of Governors of the State Bar.

California Rules of Court, Rule 958, subdivision (c):

> Each active member of the State Bar . . . shall, within 36 month periods designated by the State Bar, complete at least 36 hours of legal education approved by the State Bar or offered by a State Bar-approved provider. Eight of those hours shall address legal ethics or law practice management. One of the eight hours, may, instead, be satisfied by legal education in the civil and criminal remedies available for civil rights violations. However, members shall complete no less than four of the eight hours in legal ethics. Members may be required to complete legal education in other specified areas within the 36 hour requirement under rules adopted by the State Bar. Each active member shall report

his or her compliance to the State Bar under rules adopted by the Board of Governors of the State Bar.

Minimum Continuing Legal Education (MCLE) Regulation 2.0:

2.1. Requirement. All members of the State Bar of California on active status shall demonstrate their compliance with the continuing legal education requirement at the end of each compliance period and, except as otherwise provided, shall complete at least 36 hours of approved continuing legal education activities every 36 months. Of the 36 hours:

2.1.1. At least eight shall be in the areas of legal ethics and/or law practice management, with at least four of the eight hours in legal ethics. One of the eight hours may, instead, be satisfied by legal education in the civil and criminal remedies available for civil rights violations. However, members shall complete no less than four of the eight hours in legal ethics;

2.1.2. At least one shall relate to prevention, detection, and treatment of substance abuse and emotional distress, but no more than six shall relate to emotional distress; and

2.1.3. At least one shall relate to elimination of bias in the legal profession based on any of, but not limited to the following characteristics: sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age and sexual orientation.

MCLE Regulation 14.0:

14.1. Enrollment as Inactive Member. A member failing to comply with the requirements

after the 60 day period for compliance has expired shall be enrolled as an inactive member by the Board of Governors or an officer of the State Bar or his or her designee.

14.2. Enrollment as Inactive Member Administrative Process. The enrollment pursuant to these rules and regulations is administrative in nature and no hearing is required.

14.3. Accrual of Membership Fee. Membership fees shall continue to accrue at the active rate against a member during the period he or she is enrolled as an inactive member pursuant to section 14.1.

California Business and Professions Code section 6068, subdivisions (a) through (h):

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

STATEMENT OF THE CASE

California's MCLE program was instituted in 1990 by Legislative enactment (Cal. Bus. and Prof. Code, § 6070, subd. (a)) and by Court Rule promulgated by the California Supreme Court. (Cal. Rules of Court, Rule 958.) Under MCLE, active members of the State Bar, with certain exceptions, are required to take 36 hours of legal education within a 36 month period. Of the 36 hours, 8 must be devoted to the subject of legal ethics, or law practice management, or both, but with at least 4 hours devoted to legal ethics. (*Id.*, subd. (c).)

The Supreme Court empowered the State Bar to adopt rules requiring the study in any other specified topic. *(Ibid.)* Pursuant to this power, the Bar enacted MCLE Regulation 2.1.2, requiring that one of the ethics

hours be devoted to a class in the "prevention, detection, and treatment of substance abuse and emotional distress, but no more than six shall relate to emotional distress". The Bar also adopted MCLE Regulation 2.1.3, requiring a second hour of ethics class in the "elimination of bias in the legal profession" based on such invidious grounds as race, creed, color, etc.

On July 8, 1991, petitioners, all active members in good standing in the State Bar of California, filed suit in the Superior Court of Alameda County, seeking declaratory and injunctive relief, contending, *inter alia*, that MCLE requirements in classes in the elimination of bias from the legal profession and in the curtailment of substance abuse and reduction of emotional distress violated petitioners' rights under the First Amendment of the United States Constitution. The proceedings culminated in a summary judgment against petitioners on December 12, 1995, from which an appeal was filed.

On January 26, 2000, the California Court of Appeal, First Appellate District, Division Five affirmed the judgment. The Court rejected petitioners' First Amendment claim finding that the required classes were indeed germane to the practice of law and therefore permissible under this Court's First Amendment jurisprudence in *Keller* v. *State Bar of California*, 496 U.S. 1 (1990). The Court found that "[t]he prevention of substance abuse and emotional illness or stress among lawyers would, if accomplished, constitute a worthy endeavor, which could spare clients from the obvious harms attendant on substance abuse or emotional illness among lawyers representing the public." (App., p. 5.) Moreover, "the elimination of bias in representation and decision making, where

improperly based on irrelevant personal characteristics, has long been a goal of the legal profession, and is germane and rationally related to the special nature of law practice and the consumer protection goals of the MCLE program." *(Ibid.)* A petition for rehearing was denied on February 10, 2000 (App., p. 9) and the California Supreme Court declined to grant review on April 26, 2000. (App., p. 10.)

REASONS FOR GRANTING THE PETITION

PETITION FOR CERTIORARI SHOULD BE GRANTED TO DETERMINE THE FIRST AMENDMENT LIMITATIONS ON MANDATORY CLASSES IMPOSED BY AN INTEGRATED BAR ASSOCIATION, SPECIFICALLY IN REGARD TO "CLASSES" ON "ELIMINATION OF BIAS" AND ON "SUBSTANCE ABUSE" AND "EMOTIONAL DISTRESS"

A.

Because the First Amendment of the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment (*44 Liquormat, Inc.* v. *Rhode Island*, 517 U.S. 484, 489, fn. 1 (1996)), the powers of a state bar to infringe on the freedom of association and speech is a federal question. This Court has held that mandatory membership in a state bar does not violate the First Amendment. (*Lathrop* v. *Donohoe*, 367 U.S. 820 (1961).) This Court has also held that a state bar is nonetheless prohibited from exacting money from unwilling members for purposes not germane to the practice of law. (*Keller* v. *State Bar of California, supra*, 496 U.S. 1, 14-15.) Even if the matter for which the exaction is

imposed is germane in this way, then the imposition on First Amendment rights must still be narrowly tailored so as to avoid unnecessary infringement of First Amendment freedoms. (*Gibson* v. *State Bar of Florida*, 798 F.2d 1564, 1569 (11th Cir. 1986); see also *Schad* v. *Mount Ephraim*, 452 U.S. 61, 69, fn. 7 (1981); and *Southworth* v. *Grebe*, 151 F.3d 717, 722-733 (7th Cir. 1998).)

It is by these principles that petitioners have attacked on First Amendment grounds MCLE classes in elimination of bias and prevention of substance abuse and emotional distress. It has been petitioners' contention since MCLE was instituted that these "classes" are not "germane" to the practice of law in the proper constitutional sense of the term "germane". Petitioners have also maintained that even if the topics are germane, compulsory attendance in a class is an unnecessarily intrusive method of advancing these goals.

The Court below disagreed. It found the subject matter of these classes germane to the protection of the public against practicing lawyers. (App., p. 5.) The further question, whether classes were a means sufficiently tailored to avoid unnecessary infringement of the First Amendment, was not addressed by the Court of Appeal at all, despite a petition for rehearing pointing out the omission. Instead, the Court took the more legally vague position that the First Amendment is not even implicated "by a requirement that [petitioners] merely be passively exposed to classes relating to these subjects, without being compelled to manifest any agreement or allegiance to their goals or other political agendas." (App., p. 6.) One might therefore begin with a discussion of whether First Amendment freedoms are even implicated before

discussing whether they may be constitutionally curtailed.

B.

There is of course a right to privacy that emanates from the First Amendment. Indeed, such privacy is more a predication of First Amendment freedom than an emanation from it, for such freedoms cannot be meaningfully exercised without the right

> "to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy. 'The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasures and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be left alone – the most comprehensive of rights and the right most valued by civilized man.' " (*Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969), quoting *Olmstead* v. *United States*, 277 U.S. 438, 478, (1928), Brandeis, J., dissenting.)

It is this principle of privacy inherent in the First Amendment that is so ingrained that few would even conceive that the Government could lawfully require classes of any sort from adults who have not committed any crime and who do not seek a license for some activity

that requires some degree of regulation. It is this principle that assures the peace and quiet required or desired to nourish our own thoughts free from the hustle and bustle of an agenda deemed to be urgent by others than ourselves. Certainly the so-called elimination of bias from the legal profession is an agenda informed by an orthodoxy, and compulsory attention to this agenda intrudes on the privacy guaranteed by the First Amendment. When one further considers that the First Amendment privacy right extends its protection not only to matters of ideological or political import, but also to matters of personal health and morality (*Griswold* v. *Connecticut*, 381 U.S. 479, 482-483 (1965)), it follows that classes on substance abuse and emotional distress also come within the orbit of First Amendment values.

Another aspect of First Amendment protection implicated in the question of the required MCLE courses is the freedom to decline an expressive association with others. (*Hurley* v. *Irish-American Gay Group of Boston*, 515 U.S. 557, 578-580 (1995).) As petitioners have contended, "classes" in elimination of bias and prevention of substance abuse are not classes in the sense of a gathering of students to be taught by someone with specialized or superior knowledge on a given topic. They are rather symbolic demonstrations, in this case by the Bar, of a commitment to political and moral values of a certain sort.

Thus, torts, contracts, the rules of professional ethics, or even math, physics, and English literature are fixed bodies of objective knowledge that can be taught and learned in a more or less systematic fashion. But it is not immediately clear what it means to "study" the elimination of bias and the prevention of substance abuse and

emotional distress. If "education" is the proper term for this, it is the sort of moral education children obtain through the precepts and examples of their parents and elders and even teachers. If it is imparted through "teaching" it is teaching in the sense of *inculcating values*. For adults, such "study" should consist of self-tutored introspection, thought, debate, and discussion between equals. But mandatory classes for adults on subjects that depend more on the formation of character, the inculcation of norms, and the assessment of broad personal experience, rather than on the examination of a well defined body of knowledge, is not a "class" but a demonstration that is denominated a class much as the "teach-in" used to be a popular propaganda tool to advance political views through the forms and guises of pedagogy. For the Bar to require the membership to participate in this by providing a kind of dumbshow validation of some political and moral commitment clearly implicates the right of freedom of association.

Because these "classes" are little more than symbolic demonstrations, they also involve the First Amendment principle of content discrimination. In requiring "classes" in elimination of bias and prevention of substance abuse and emotional distress, the State Bar has not merely decreed a subject matter to be examined, it has decreed the point of view from which it *must* be examined. Obviously, there will be allowed no MCLE class on the *propagation* of bias or on, perhaps, relieving emotional distress *through* substance abuse. The First Amendment prohibits the State from creating a forum that is not open to *any* point of view on the subject for which the forum was

created. (*Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828-829 (1995).)

To buttress its view that no First Amendment value was at stake, the state court cited several cases (App., pp. 6-7), but without appreciating the distinguishing feature of these cases. Some of these cases stand for the proposition that *children* can be required to take courses in civics or in fashionable topics deemed important by school authorities. (*Board of Education* v. *Barnette*, 319 U.S. 624, 631-632 (1943); *Tennison* v. *Paulus*, 144 F.3d 1285, 1287 (9th Cir. 1998).) The State Bar, however, is not a school system and petitioners are indeed not children whose First Amendment rights may be highly circumscribed because of their infancy. (*Ginsburg* v. *New York*, 390 U.S. 629, 638 (1967); *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 682 (1986).)

As to the other cases cited by the court, *Hamilton* v. *Regents*, 293 U.S. 245 (1934) did involve an imposition on older children and young adults at the University of California. But these young adults and children had *voluntarily* enrolled in a public university and that is a key distinction between University students and lawyers who are compelled to join a bar association. (*Board of Education* v. *Barnette, supra*, 319 U.S. at 632.) As to *Chaney* v. *State Bar of California*, 386 F.2d 962 (9th Cir. 1967), also cited by the Court of Appeal, this case stands merely for the proposition that the State Bar may require classes in legal education on the part of prospective lawyers. This is not in dispute.

C.

Thus, First Amendment freedoms are in play. This does not end the question, for even if in play, they may be qualified or curtailed in the face of other interests. The Bar has the power to curtail the First Amendment rights of its members if the imposition on those members is germane to the practice of law. The Court of Appeal held that classes in elimination of bias and prevention of substance abuse are germane to the practice of law insofar as they protect the legal consumer. (App., p. 5.) Petitioners believe this to be wrong. If invidious bias, substance abuse, and emotional instability are problems at all, they represent broad social problems that beset attorneys *qua* men and women, *not qua* attorneys. It is not sufficient to add the nominal tag of "in the legal profession" in order to render these matters germane to the practice of law. Thus, when the New Mexico Bar claimed broad powers to impose exactions on attorneys, in order to better "the administration of justice or improvement of the legal system", this was rejected as too broad because it was difficult to conceive of an issue "which cannot arguably be related" to these phrases. (*Arrow* v. *Dow*, 544 F.Supp. 458, 462 (N.M. 1982).) The Puerto Rican Bar was similarly checked for a similar overreaching:

> "One can hardly conceive of loftier goals in a democratic society than creating a strongly pluralistic society and improving the administration of justice. And yet broad statements such as these cannot form the basis for an infringement of First Amendment rights. If used at all they must be narrowly tailored." (*Schneider* v. *Colegio de Abogados de Puerto Rico*, 682 F.Supp. 674, 683 (D.P.R. 1987); see *Schneider* v. *Colegio de*

Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990).)

One may take the thought farther. If it were merely necessary to append the phrase "in the legal profession" to justify an imposition, what imposition could not be conceived as justified? The phrase, "in the legal profession", may be fungibly used for all manner of activities not germane to the practice of law. If the popular canard about the extraordinary dishonesty of attorneys is true, why not classes on rectitude and moral virtue "in the legal profession"? Wouldn't the amount of paper wasted by lawyers justify a mandatory class on environmental abuse "in the legal profession"? If ever an attorney has kept a weapon in his office, shouldn't he be trained in the avoidance of gun violence "in the legal profession" lest he inadvertently shoot a client; or in anger-control "in the legal profession", lest he be tempted to shoot that troublesome client on purpose? The examples may be multiplied. Absurdity, all too often, will be in the eye of the beholder. But grammatical forms that narrow the syntax of a sentence do not narrow the substantive incursion on First Amendment freedoms. (*Riley* v. *National Federation of the Blind of North Carolina*, 487 U.S. 781, 795-796 (1988).) The phrase "in the legal profession" is only an illusory limitation and sets a standard too amorphous to survive First Amendment scrutiny. (*Gibson* v. *State Bar, supra*, 798 F.2d at 1569.)

D.

But even if the state court of appeal was correct, that the topics in question are germane to the purposes of a compelled association in a state bar, it still must be established that "classes" are the most narrowly tailored method to advance these germane purposes. It seems self-evident to petitioners that classes are entirely overbroad as a means of advancing the goals of elimination of bias and prevention of substance abuse and emotional distress. The state bar always has been free to evangalize on any topic it wishes. (*Morrow* v. *State Bar of California*, 188 F.3d 1174 (9th Cir. 1999).) If the topic is germane, the bar may use membership fees to fund its propaganda. (*Keller* v. *State Bar of California, supra*, 496 U.S. 1.) It may also offer to members who want it, counseling services. (*Thiel* v. *State Bar of Wisconsin*, 94 F.3d 399, 405 (7th Cir. 1996).) It may even discipline members whose abuse of substances, whose emotional distress, or whose invidious biases have lead to professional malfeasance.

Indeed, California Business and Professions Code section 6068 comprehensively outlines a regimen of discipline for malfeasance arising from any cause whatsoever. Thus, the Section requires that an attorney "maintain the respect due to the courts of justice and judicial officers" (subd. (b)); that he "abstain from all offensive personality, and [ ] advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged" (subd. (f)); that he not "encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest (subd. (g)); and that he never "reject, for any consideration personal to himself, the

cause of the defenseless or oppressed" (subd. (h)). These injunctions manifest basic principles of honor and civility in terms narrowly and precisely drawn for the practice of law. They place an admirable constraint on an attorney's inclination to gratify his personal feelings, whether bigoted or otherwise unseemly, in professional actions. If he violates any of these injunctions because of bigoted or otherwise unseemly prejudices, he may be disciplined, even to the point, perhaps, of taking classes. But short of malfeasance, his thoughts are his own, and the only personal political and philosophical requirement demanded of him as an attorney is "[t]o support the constitution and law of the United States and of this state" (Bus. and Prof. Code, § 6068, subd. (a)), and even this commitment must be enforced with extreme caution and circumspection. (*Konigsberg* v. *State Bar*, 343 U.S. 252 (1957).)

Thus, if elimination of biases and prevention of substance abuse and emotional distress are germane to the compelled association of an integrated bar, it can hardly be maintained that these matters cannot be advanced without requiring classes of those who have committed no professional impropriety at all. Again, the Bar is free to say what it likes on these topics; it is free to offer whatever help is required by those who ask for it; and to impose whatever "help" is required by those who have violated the rules of professional conduct because of biases, substance abuse, or emotional distress. Where, then, is the necessity to impose on the time and money of members in good standing who prefer not to subscribe to the Bar's agenda and to act as props in its morality play?

E.

The State Court of Appeal decision, which appears to be the only published opinion in the nation on the relationship between the First Amendment and mandatory classes for adults, is cursory and only superficially resolves the difficult and important constitutional questions presented by the "classes" at issue here. This alone should warrant a grant of certiorari to allow *this* Court to define the limits in such cases.

As manifest in the opinion itself, there has been a tendency in some quarters to minimize the complaints of petitioners as a sort of legal hypochrondia, given the nugatory imposition and the beneficent purposes involved. One does not wish to overstate the matter, and one may be thankful the Bar is timid in these exactions. However, it is well to remember that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (*Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).) It is even better to recall the eloquent admonition of Justice Jackson:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*Board of Education* v. *Barnette*, *supra*, 319 U.S. at 641-642.)

Even if this Court should eventually reject the claim of petitioners, this petition should raise sufficient constitutional concern to warrant a grant of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Dated: June 19, 2000

Respectfully submitted,

MARK D. GREENBERG, *in pro. per.*,
and as attorney for Petitioners
Smith and Torbet

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARK D. GREENBERG et al., **Plaintiffs and Appellants,** **v.** **THE STATE BAR OF CALIFORNIA et al.,** **Defendants and Respondents.**	A073839 (Alameda County Super. Ct. No. 682931-9) (Filed Jan. 26, 2000)

Appellants contend the trial court improperly granted summary judgment on their claims against the State Bar of California (the State Bar), challenging the constitutionality of the State Bar's Mandatory Continuing Legal Education (MCLE) program. We must affirm the trial court's ruling, under the compulsion of the recent majority opinion of the California Supreme Court in *Warden v. State Bar* (1999) 21 Cal.4th 628 (*Warden*), which upheld the constitutionality of the MCLE program for California attorneys. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).)

I. FACTS AND PROCEDURAL HISTORY

Appellants are California attorneys licensed to practice by the State Bar. As such, they were required by

Business and Professions Code section 6070, and rule 958, California Rules of Court, to comply with the requirements of the State Bar's MCLE program of continuing legal education classes for practicing attorneys. The MCLE program required at the time that practicing attorneys who were not specially exempted from the program must attend 36 hours of education classes in every 36-month period, including mandatory classes in the prevention of "substance abuse" and "emotional distress" and the "elimination of bias." (See rule 958, Cal. Rules of Court; *Warden, supra,* 21 Cal.4th at pp. 634-637.) Courses are offered by private "providers" certified by the State Bar, and the course offerings vary widely, ranging from conventional lectures on recognized legal subjects to ski trips, cruises, Eastern meditation techniques, and other offerings. (See *Ibid.*)

Appellants filed this action against the State Bar in the superior court, seeking declaratory and injunctive relief from the requirements of the MCLE program. Appellants alleged the MCLE program was unconstitutional as a violation of equal protection principles, because the State Bar had no rational basis for subjecting appellants to the MCLE requirements, while exempting certain other groups or classes of California attorneys, such as legislators, other state officers and employees, law professors, and retired judges. Appellants also contended, as a subsidiary argument, that the MCLE program violated their First Amendment rights not to be subjected to compulsory governmental reeducation programs and partisan political propaganda in favor of a "political and ideological agenda" which appellants did not share.

The trial court first entered an order which "transferred" this case to the California Supreme Court for decision. The Supreme Court, however, declined to accept this "transfer" and remanded the matter to the superior court for decision.

Thereafter, the trial court ultimately rejected appellants' claims, and granted summary judgment to the State Bar. Appellants brought this timely appeal from that ruling. The matter was transferred to this Division from Division Two of this District, because we had recently found the MCLE program unconstitutional on equal protection grounds, in the case which ultimately resulted in the Supreme Court's *Warden* decision. We then stayed this appeal, in anticipation of the Supreme Court's decision in *Warden*. Our high court has now issued its decision in *Warden*, in which a majority of the justices voted to uphold the constitutionality of the MCLE program. The matter is therefore ripe for the issuance of our opinion in light of *Warden*.

II. DISCUSSION

We are compelled by the majority opinion in *Warden* to affirm the trial court's ruling. (See *Auto Equity, supra*, 57 Cal.2d at p. 455.)

In *Warden*, the majority rejected an equal protection challenge identical to appellants' and upheld as rational and constitutional the challenged exemptions from the MCLE program for certain groups of attorneys who exercised political power during the legislative process, such as legislators, other state employees, retired judges, and

law school professors. (*Warden, supra,* 21 Cal.4th at pp. 634-651.)

Although we previously issued an opinion in *Warden* in which we agreed with the well-reasoned criticism of the dissenting opinions (see *Warden, supra,* 21 Cal.4th at p. 656 [dissenting opinion of Kennard, J.]; see *id.* at p. 667 [dissenting opinion of Brown, J.]), we are now bound by the decision of the majority of our high court to affirm the judgment in favor of the State Bar. (See *Auto Equity, supra,* 57 Cal.2d at p. 455.)

At oral argument, appellants recognized the majority opinion in *Warden* compels us to reject their primary argument, challenging the constitutionality of the MCLE program on equal protection grounds. However, appellants urge a second constitutional infirmity not advanced or addressed in *Warden,* that the MCLE program violates their First Amendment right to be free of compulsory governmental propaganda in favor of an ideological purpose with which appellants do not agree, and which is not "germane" or rationally related to the legitimate goals of legal education for practitioners. (See *Keller v. State Bar of California* (1990) 496 U.S. 1, 13-14 (*Keller*).) In light of *Warden, Keller,* and other precedents, we also reject this related constitutional argument.

First, we note that the majority, and even the dissenters, in *Warden* apparently agreed that the MCLE program requirements were rationally related to the "consumer protection" goals of the legislation, the needs of legal profession, and legal practicioners' [sic] professional roles within that system, and they thereby implicitly rejected the foundations of appellants' First

Amendment claims. (See *Warden, supra,* 21 Cal.4th at pp. 645-647 [majority opinion], 654-656 [dissenting opinion of Kennard, J.], 665-667 [dissenting opinion of Brown, J.].) Thus, it seems highly likely that our high court would also find the MCLE program did not violate appellants' First Amendment rights, by simply requiring them to attend classes that are reasonably related and "germane" to the nature of the legal profession. (See *Keller, supra,* 496 U.S. at pp. 13-14.)

Appellants, however, focus their First Amendment argument on the requirements that they attend a certain number of mandatory MCLE classes relating to the general areas of the prevention of "substance abuse" and "emotional distress" and the "elimination of bias." (See rule 958, Cal. Rules of Court) In light of *Warden,* we conclude that these subjects are "germane" and rationally related to the apparent consumer protection goals of the MCLE program.

The prevention of substance abuse and emotional illness or stress among lawyers would, if accomplished, constitute a worthy endeavor, which could spare clients from the obvious harms attendant on substance abuse or emotional illness among lawyers representing members of the public. Further, the elimination of bias in representation and decision making, where improperly based on irrelevant personal characteristics, has long been a goal of the legal profession, and is Germane and rationally related to the special nature of law practice and the consumer protection goals of the MCLE program. (See *Warden, supra,* 21 Cal.4th at pp. 634-651; *Thiel v. State Bar of Wisconsin* (7th Cir. 1996) 94 F.3d 399, 405 [finding no First Amendment violation from a number of mandatory

State Bar programs, including a program to assist lawyers suffering from substance abuse, and prevent its recurrence].)[1]

Moreover, in light of the relevant case law, we find it difficult to understand appellants' argument that their First Amendment rights are violated by a requirement that they merely be passively exposed to classes relating to these subjects, without being compelled to manifest any agreement or allegiance to their goals or other political agendas. (See, e.g., *Hamilton v. Regents* (1934) 293 U.S. 245, 262-265 [required training courses in military science and tactics did not violate First Amendment rights of conscientious objectors to violence]; *Board of Education v. Barnette* (1943) 319 U.S. 624, 631-632 [students may not be required to salute the American flag with a Hitler-style, stiff-arm salute, but they may be required to attend civics classes relating to political subjects, including the symbolism of the flag]; *Chaney v. State Bar of California* (9th Cir. 1967) 386 F.2d 962, 964 [applicants to be California lawyers may constitutionally be required to demonstrate familiarity with certain legal concepts, including essay questions on "legal philosophy," even though they might

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[1] In the proceedings below, the State Bar proffered specific documentary evidence, which appeared to show that substance abuse and emotional illness are prevalent among certain attorneys who become the subject of disciplinary proceedings. The State Bar also sought to introduce evidence that bias, especially gender bias, has also been an ongoing problem for the legal profession. Although appellants objected to the State Bar's proffered evidence as irrelevant, incompetent, and lacking in foundation, it is unclear whether the trial court ruled on these objections. In any event, we need not rely on the proffered specific evidence, and disregard it here.

not be required to manifest allegiance to any particular legal philosophy]; *Tennison v. Paulus* (9th Cir. 1998) 144 F.3d 1285, 1287 [no First Amendment violation to require students to attend classes in fashionable subjects, despite claims that this interfered with certain students' "freedom of mind"].[2]

While we recognize appellants' desire to avoid exposure to what they perceive to be a well-intentioned, but sometimes patronizing, condescending, and inept educational agenda, we also recognize that a majority of the members of our Supreme Court voted in *Warden* to impose the requirements of the State Bar's MCLE program of continuing legal education classes on the vast majority of California's practicing lawyers. We are bound by that ruling; appellants must therefore seek relief from that ruling elsewhere. (*Auto Equity, supra,* 57 Cal.2d at p. 455.) We conclude that appellants' constitutional challenges to the MCLE program are unfounded.

III. DISPOSITION

The judgment of the trial court is affirmed, under compulsion of *Warden, supra,* 21 Cal.4th 628. (See *Auto Equity, supra,* 57 Cal.2d at p. 455.)

STEVENS, J.

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[2] In addition, nothing would prevent appellants from establishing their own course curriculum as providers of MCLE training, and appellants could then comply with the MCLE requirements by attending classes more in accord with their own viewpoints on the required subjects.

We concur.

JONES, P.J.

HAERLE, J.*

* Associate Justice, Division Two of the First District Court of Appeal, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5

MARK D. GREENBERG, et al.,
Plaintiffs and Appellants.

v.

STATE BAR OF CALIFORNIA,
et al.,
Defendants and Respondents.

A073839
Alameda County No. 6829319

BY THE COURT:

The petition for rehearing is denied.

Date: FEB 10 2000 JONES, P.J. P.J.

First Appellate District, Division Five, No. A073839
S086254

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

MARK D. GREENBERG Et Al., Appellants

v.

THE STATE BAR OF CALIFORNIA Et Al., Respondents

(Filed Apr. 26, 2000)

Appellants' petition for review DENIED.

/s/ GEORGE
Chief Justice

Supreme Court, U.S.
FILED
JUL 20 2000
CLERK

(2)

No.99-2030

INTHE
SUPREME COURT OF THE UNITED STATES

MARK D. GREENBERG, MALCOLM A. SMITH,
and HUGO TORBET,

Petitioners,

v.

THE STATE BAR OF CALIFORNIA and
THE BOARD OF GOVERNORS OF
THE STATE BAR OF CALIFORNIA

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents the State Bar of California and the Board of Governors of the State Bar of California ("Respondents") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the California Court of Appeal's opinion in this case.

I. STATEMENT OF THE CASE

A. Nature Of The State Bar

Respondent State Bar is a constitutional agency in the judicial branch of state government that acts as the administrative arm of the California Supreme Court in all matters relating to the admission, discipline and reinstatement of attorneys. Cal. Const., art. VI, §9, Cal. Bus. & Prof. Code, §§6008, 6008.2; *In re Attorney Discipline System*, 19 Cal.4th 582, 598-600, 967 P.2d 49, 79 Cal.Rptr.2d 836 (1998). All attorneys licensed to practice law in California must be members of the State Bar. Cal. Const., art. VI, §9; Cal. Bus. & Prof. Code, §6002; *Keller v. State Bar of California*, 496 U.S. 1, 110 L.Ed.2d 1, 110 S.Ct. 2228, 2235 (1990).

B. Creation Of The MCLE Program

In 1989, the California Legislature adopted Business and Professions Code section 6070, initiating a mandatory continuing legal education program for California lawyers. Cal. Bus. & Prof. Code, §6070, subd. (a). The statute required the State Bar of California to request the Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer a mandatory continuing legal education program. Cal. Bus. & Prof. Code, §6070, subd. (a). The legislation further provided that the following categories of attorneys would be exempt from the requirements: retired judges; officers and elected officials of the State of California; full-time professors of law; and full-time employees of the State of California. Cal. Bus. & Prof. Code, §6070, subd. (c).

Pursuant to the legislation, and after statewide public hearings, the State Bar filed a request with the Supreme Court for a new rule of court, authorizing the State Bar to establish a mandatory continuing legal education program. In response, on

December 7, 1990, the California Supreme Court adopted Rule 958. Rule 958 mandated the State Bar to establish and administer a minimum continuing legal education program. The new rule of court incorporated the statutory exemptions provided by section 6070(c) and also set forth an additional category of attorneys who would be exempt from the education requirements -- full-time employees of the United States Government, acting within the scope of their employment. Cal. Rule of Court 958 (c). The new rule of court also provided that the rules adopted by the Board of Governors could provide for exemptions for other categories of attorneys. *Id.*

On December 8, 1990, the State Bar adopted proposed MCLE Regulations to implement the program ordered into effect by the Supreme Court. Under the MCLE Regulations, attorneys may accrue MCLE credit in a variety of ways and at their own pace, including self-study, so long as the total number of credits are earned by the end of the compliance period. MCLE Regulations, §§4.1, 4.2, 5.2, 5.3, 5.4. Pursuant

to United States Supreme Court Rule 24(f), the text of these regulations appears in the appendix to this Opposition.

Business and Professions Code section 6070 was amended, effective January 1, 2000 to reduce the original requirement of 36 hours of continuing education every 36 months to 25 hours every 36 months. As amended, section 6070 also reduces the requirement of 8 hours in legal ethics or law practice management (at least 4 hours of which had to be in legal ethics) to a total of 4 hours in legal ethics only, and deletes the categorical exemption from the MCLE requirement for retired judges. Conforming amendments to the California Rule of Court and the MCLE Regulations are pending.

II. ARGUMENT

A. The Court Of Appeal Correctly Applied Established Constitutional Law To Find That Petitioners' First Amendment Rights Are Not Violated By The Requirement That They Be Passively Exposed To The Challenged MCLE Courses, Without Being Compelled To Manifest Agreement Or Allegiance To The Subject Matter.

The Court of Appeal correctly found that the MCLE requirements challenged by Petitioners do not present a sufficiently substantial intrusion to constitute a First Amendment violation. *See Elrod v. Burns*, 427 U.S. 347, 362, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976) [before applying balancing test to determine if First Amendment infringement is justified by compelling state interests, there must be infringement that involves "significant impairment" of First Amendment rights.] As the Court of Appeal held, a requirement that Petitioners take two hours of instruction over a period of three years either in live classes, self study or by speaking in an approved education course is not a substantial enough intrusion to warrant constitutional scrutiny.

Further, the Court of Appeal cited cases holding that required study in subjects, even those which unquestionably contain ideological content, does not implicate First Amendment rights, where a person is only required to be passively exposed to subject matter, without being compelled to manifest any agreement or allegiance to a particular message. *See Hamilton v. Regents*, 293 U.S. 245, 262-265, 55 S.Ct. 197, 79 L.Ed. 343 (1934) [required training courses in military science and tactics did not violate First Amendment rights of conscientious objectors to violence]; *Board of Education v. Barnette* 319 U.S. 624, 631-632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) [students may not be required to salute the American flag with a Hitler-style, stiff-arm salute, but they may be required to attend civics classes relating to political subjects, including the symbolism of the flag]; *Chaney v. State Bar of California*, 386 F.2d 962, 964 (9th Cir. 1967) [applicants to be California lawyers may constitutionally be required to demonstrate familiarity with certain legal concepts,

including essay questions on "legal philosophy," even though they might not be required to manifest allegiance to any particular legal philosophy]; *Tennison v. Paulus*, 144 F.3d 1285, 1287 (9th Cir. 1998) [no First Amendment violation to require students to attend classes in fashionable subjects, despite claims that this interfered with certain students' "freedom of mind"]. Petitioners' attempts to distinguish this controlling authority were properly rejected by the Court of Appeal and do not justify review by this Court.

B. The Court Of Appeal Properly Found That, Even If The Challenged MCLE Requirements Intruded On Petitioners' First Amendment Rights, They Passed Constitutional Scrutiny Because They Are Germane To The State Bar's Permissible Goals of Consumer Protection and Attorney Education.

The Court of Appeal correctly held that even if the challenged MCLE requirements are found to infringe upon Petitioners' First Amendment rights, they nevertheless pass constitutional scrutiny because they advance the State Bar's interests in regulating the legal profession and improving the

quality of legal services in California. Petitioners have conceded throughout this litigation that their constitutional challenge is governed by the test articulated by this Court in *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228 (1990) ("*Keller*") but disagree with the Court of Appeal's conclusion that the challenged MCLE requirements are germane under *Keller*. However, the challenged activities clearly pass muster under *Keller* and related cases.

In *Lathrop v. Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed. 2d 1191 (1961) ("*Lathrop*"), the United States Supreme Court rejected a Wisconsin lawyer's challenge to the state's requirement mandating membership in the Wisconsin bar and compelling payment of dues as violative of his First and Fourteenth Amendment rights to freedom of association. The Supreme Court held that an integrated bar served "the State's legitimate interests in raising the quality of professional services" and that these costs should be shared by all lawyers, even though the bar may also engage in some legislative

activity with which the plaintiff attorney disagreed. *Lathrop*, *supra*, 81 S.Ct, 1838-1839. The Supreme Court noted with seeming approval that among the activities of the Wisconsin Bar justifying integration were "those [activities] directed towards postgraduate education of lawyers." *Lathrop*, *supra*, 81 S.Ct. at 1835-1836.

However, the *Lathrop* court reserved judgment on the question of whether compulsory bar membership and dues violated plaintiff's First Amendment rights when the bar engaged in political or ideological activities. *Lathrop*, *supra*, 81 S.Ct. at 1826-1827, 1838-1840. That question was later reached in *Keller v. State Bar of California*, *supra*, 110 S.Ct. 2228. In *Keller*, this Court reaffirmed its decision in *Lathrop* upholding the constitutionality of the integrated bar, but went on to hold that the State Bar is subject to the same First Amendment principles applied in cases involving use of compulsory dues by unions to fund political or ideological activity. *Keller*, *supra*, 110 S.Ct. at p. 2235. Accordingly, the

court held that the State Bar may constitutionally spend its membership fees on those activities that are necessarily or reasonably related to its purposes of regulating the legal profession or improving the quality of legal services available to the people of the State. *Keller*, *supra*, 110 S.Ct. at 2236. These activities are considered germane and are chargeable to all members, even if they have political or ideological coloration. On the other hand, the State Bar may not use the fees of members who object to paying for activities that have political or ideological coloration and are not reasonably related to the bar's germane purposes, i.e., regulating the profession or improving the quality of legal services. *Keller*, *supra*, 110 S.Ct. at 2233-2234, 2236.

The Court of Appeal correctly found that the challenged MCLE courses were clearly germane under *Keller*, stating as follows:

> The prevention of substance abuse and emotional illness among lawyers would, if accomplished, constitute a worthy endeavor,

> which could spare the client from the obvious harms attendant on substance abuse or emotional illness among lawyers representing the public. Further, the elimination of bias in representation and decision making, where improperly based on irrelevant personal characteristics, has long been a goal of the legal profession, and is germane and rationally related to the special nature of law practice and the consumer protection goals of the MCLE program. *See Warden, supra*, 21 Cal.4th at pp. 634-651, 88 Cal.Rptr.2d 283, 982 P.2d 154; *Thiel v. State Bar of Wisconsin* (7th Cir. 1996) 94 F.3d 399, 405 [finding no First Amendment violation from a number of mandatory State Bar programs, including a program to assist lawyers suffering from substance abuse, and prevent its recurrence.]

Greenberg v. State Bar, 78 Cal.App.4th 39, 92 Cal.Rptr.2d 493, 496.

Citing circuit court decisions preceding this Court's decision in *Keller*, and the Seventh Circuit's decision in *Southworth* v. *Grebe*, which has since been superceded by this Court's decision in *Board of Regents of the University of Wisconsin System* v. *Southworth*, ___ U.S. ___, 120 S.Ct. 1346, ___ L.Ed.2d ___ (2000), Petitioners go on to assert that, even if the Court of Appeal was correct in finding that the

challenged MCLE classes were germane under *Keller*, the court erred in failing to apply an additional test to see if the classes were narrowly tailored to advance the interests found to be germane. Petitioners fail to understand that *Keller* does not require this additional scrutiny where it is found, as the Court of Appeal found here, that a challenged activity is germane to the State Bar's permissible goals. *Keller*, 496 U.S. at 8. Moreover, Petitioners do not convincingly argue that the challenged educational requirements are not narrowly tailored. As explained above, Petitioners object to a requirement of two hours of education over a 30 month period, which can be satisfied in a variety of ways including self-study or time spent teaching the required subjects. By arguing that, in order to be narrowly tailored, the classes should only be required of attorneys who have been disciplined, Petitioners ignore the holding of the Court of Appeal that education aimed at prevention of harm to clients is germane because it is related to regulation of the legal profession and protection of consumers

of legal services. *Greenberg v. State Bar*, *supra*, 78 Cal.App.4th 39, 92 Cal.Rptr.2d 493, 496.

III. CONCLUSION

This case presents no important unsettled federal question warranting review by this Court. Rather, the issues raised were properly decided by the Court of Appeal based on this Court's analysis in *Keller*. Accordingly, for this and all the reasons stated above, the petition for writ of certiorari should be denied.

Dated: July 20, 2000

Respectfully submitted,

MARIE M. MOFFAT
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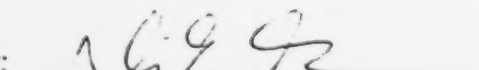
DINA E. GOLDMAN

By: 
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The State Bar of California,
The Board of Governors of
The State Bar of California

MCLERULESANDREGULATIONS
(adopted by State Bar of California Board of Governors 12/8/90; last revised effective 9/1/97)

4.0 CATEGORIES OF CREDIT

4.1 PARTICIPATORY CREDIT

Participatory credit may be claimed for:

4.1.1 Attending approved education activities, including lectures, panel discussions, question-and-answer periods, or in-house education;

4.1.2 Viewing videotapes or film instruction, listening to audiotapes, or viewing or participating in other audiovisual activities including interactive video instruction and activities electronically transmitted from another location. The viewing, listening, or participating must be approved, and must be verified by the provider (for purposes of this section, sponsorship requires the approved provider to ensure compliance with sections 7.1 and 7.2);

4.1.3 Speaking in approved education activities;

4.1.4 Attending a law school class after the member's admission to practice in California, provided the member officially registers for the class and satisfactorily completes the class (by audit or grade), as required by the law school; or

4.1.5 Teaching a class at a law school.

4.2 SELF-STUDY CREDIT

Up to but not more than 18 hours of self-study credit, or in the case of a proportional requirement, up to but not more than one-half of the required hours, may be claimed per compliance period for:

4.2.1 Viewing approved videotapes or videotapes of approved activities or viewing or participating in other approved audiovisual activities, including interactive video instruction and activities electronically transmitted from another location;

4.2.2 Listening to approved audiotapes or audiotapes of approved activities;

4.2.3 Preparing, as an author or co-author, written materials published or accepted for publication, e.g., in the form of an article, chapter, or book, which contribute to the legal education of the author member (which were not prepared in the ordinary course of the member's practice or employment or to accompany speaking in an approved education activity); or

4.2.4 Participating in self-assessment testing (open-book tests that are completed by the member, submitted to the provider, graded, and returned to the member with the correct answers and an explanation of why the answer chosen by the provider is the correct answer).

5.0 COMPUTATION OF CREDIT HOURS

5.2 CREDIT FOR SELF-ASSESSMENT TESTS

For self-assessment tests, providers must specify the maximum credit allowable. Credit may be offered only for the time actually spent answering the self-assessment test questions and reviewing the results from the provider.

5.3 CREDIT FOR SPEAKERS

5.3.1 Credit hours for speaking in an approved education activity are computed by multiplying actual speaking time by four. For repeat presentations, speakers may claim only actual speaking time. Each presentation of a workshop or skills training activity (an education activity that includes the active participation of attendees in the form of interactive exercises, simulations, and demonstrations and therefore must be modified for the attendees at each presentation) will count as a separate education activity.

5.3.2 Credit hours for panelists at an approved education activity are computed by multiplying the length of time the panelist is assigned to speak by four. If specific speaking times are not assigned to the panelists, "the length of time the panelist is assigned to speak" means the actual length of the education activity divided by the number of panelists. For the remainder of the panel and for repeat presentations, panelists may claim only actual attendance time.
For example, a two-hour panel with four panelists who are not assigned specific speaking times would be calculated as follows:

1. To determine each panelist's speaking time, divide the length of the panel by the number of panelists (in this case, 2 hrs x 60 min/hr = 120 mins divided by 4 panelists = 30 mins or .5 hrs of speaking time).

2. Multiply the panelist's speaking time x 4 (.5x4 = 2 hrs).

3. For the remainder of the panel (1.5 hrs), credit the panelist with actual attendance time only. Do NOT count the panelist's speaking time twice, i.e., as part of the attendance time.

4. Each panelist should receive 3.5 hrs (2 hrs of speaking credit plus 1.5 hrs of attendance).

5.3.3 A moderator who either introduces other speakers or performs in an administrative capacity and does not present material having significant current intellectual or practical content for members may claim the same credit hours as attendees.

5.4 CREDIT FOR TEACHING A LAW SCHOOL CLASS

5.4.1 Credit hours for teaching a law school class are computed by multiplying the number of credit hours/units granted by the law school by 12. If a portion of a law school class is devoted to a subject set forth in section 2.1, credit hours for teaching that subject are computed by multiplying actual speaking time by one. In no case may the credit hours claimed for teaching a law school class exceed credit hours/units multiplied by 12.

5.4.2 Credit hours for a guest lecturer or substitute teacher in a law school class are computed by multiplying actual speaking time by four. For repeat presentations, credit may be claimed only for actual speaking time.

Supreme Court, U.S.
FILED
JUL 26 2000
CLERK

(3)

No. 99-2030

In The

Supreme Court of the United States

MARK D. GREENBERG, MALCOLM A. SMITH, and HUGO TORBET,

Petitioners,

vs.

THE STATE BAR OF CALIFORNIA and THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1999

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Petitioners have requested this Court to grant certiorari to determine whether mandatory classes in the elimination of bias, substance abuse, and emotional distress for members of an integrated bar association violate the First Amendment rights of dissenting members. The question, as petitioners maintained, required a determination whether such subjects were germane to the practice of law and, if so, whether the requirement of classes, as opposed to monetary exactions to support the Bar's own speech and expression, were sufficiently narrow to avoid unnecessary infringement of First Amendment rights. Respondents urge a denial of the writ because, as respondents maintain, existing principles of law clearly and thoroughly resolve the question presented here. In the following, however, petitioners, pursuant to Rule 15.6 of the Rules of the United States Supreme Court, will briefly address selected points in order to show that the law as applied in this context is hardly resolved in any definitive manner, and that a grant of certiorari by this Court is appropriate.

ARGUMENT IN REPLY TO RESPONDENTS' OPPOSITION

A.

THE SIGNIFICANCE OF A FIRST AMENDMENT VIOLATION IS DETERMINED QUALITATIVELY AND NOT QUANTITATIVELY

Respondents maintain that two hours of study in the subjects at issue, spread over the course of three years, and dischargeable by self-study, does not constitute an intrusion substantial enough to implicate the First Amendment at all. (Opp., pp. 5-6.)

In determining the significance of an intrusion on First Amendment rights, it is the quality and not the quantity that controls. (*Elrod v. Burns*, 427 U.S. 347, 373 (1976).) It requires only ten seconds to recite the Pledge of Allegiance, and yet those who wish not to pledge their allegiance in this way cannot, under the First Amendment, be forced to do so. (*Board of Education v. Barnette*, 319 U.S. 624 (1943).) Two hours of indoctrination in subjects clearly related to moral judgment and values is, qualitatively, an imposition within the orbit of the First Amendment. That self-study is possible does not render the imposition any the less within the orbit of the First Amendment since the fundamental concern of First Amendment protection is not merely one's time, but one's *mind:*

> "If the First Amendment means anything, it means that a State has no business telling a man sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the

> thought of giving government the power to control men's minds." (*Stanley v. Georgia*, 394 U.S. 557, 565 (1969).)

In this connection, petitioners have maintained that the required "classes" in question impinge on at least three First Amendment values: privacy (*id.*, p. 564); forum neutrality (*Board of Regents of the University of Wisconsin System v. Southworth*, ___ U.S. ___, 120 S.Ct. 1346, 1350 (2000); and association (*Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 578-580 (1995)). In regard to association, it is worth noting that after the petition for writ of certiorari was filed, this Court issued a decision in *Boy Scouts of America v. Dale*, ___ U.S. ___, 120 S.Ct. 2446 (2000). If, per *Dale*, the Roy Scouts can reasonably maintain that their organizational activities and stated goals are expressive of ethical and moral values protected by the First Amendment, can the State Bar of California reasonably maintain that "classes" in the elimination of invidious biases, substance abuse, and emotional distress are not an expression of ethical and moral values whose compulsory imposition implicates the First Amendment rights of the members of the bar? This and other First Amendment questions surely raise substantial questions that have not been definitively addressed anywhere, including the State Court opinion in this case.

B.

WHETHER THE REQUIRED TOPICS ARE "GERMANE" TO THE PRACTICE OF LAW IS HIGHLY DEBATABLE AND WORTHY OF FURTHER EXAMINATION BY THIS COURT

In regard to whether the required topics are germane to the practice of law, respondents do no more than quote the California Court of Appeal without addressing petitioners' criticism of this holding. (Opp., at pp. 7-11.) Certainly, on the face of things, elimination of bias, substance abuse, and emotional distress are not "germane" in the same sense or same degree that topics such as torts, contracts, constitutional law, etc., are "germane." There is considerable room for discussion about this far beyond the *ipse dixit* of the State Court's opinion. Furthermore, in *Keller v. State Bar of California*, 496 U.S. 1 (1990), this Court did not define "germane", which linguistically, implies a *close* connection, derived as it is from the Latin, *germanus* or *germana*, meaning brother or sister. (Shorter Oxford English Dictionary, First Edition, p. 845, "Germane".) An examination by this Court of the degree of familial resemblance between the practice of law and the required topics will shed important light on this entire area of constitutional law.

C.

FURTHER REVIEW IS REQUIRED TO CLARIFY *KELLER*

Petitioners maintained that even if the required topics were germane, anticipatory classes were not narrowly tailored to avoid unnecessary infringement on First Amendment rights. Petitioners pointed out that the Bar could discipline members who committed malfeasance related to invidious bias, substance abuse, or to emotional distress. Respondents maintain that because *Keller* said nothing about less restrictive alternatives, this concept is not part of the First Amendment analysis in this context. (Opp., at pp. 11-12.)

One should first note that this Court has repeatedly employed an analysis of less restrictive alternatives in a variety of factual contexts involving the First Amendment. (*NAACP v. Alabama*, 377 U.S. 288, 307 (1964); *Schad v. Mount Ephraim*, 452 U.S. 61, 69, fn. 7 (1981); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 13-14 (1986); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75-76 (1990); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 215-216 (1997).) If less restrictive alternatives are not mentioned in *Keller* it is worth considering the reason.

Respondents do not give a reason, but petitioners would suggest that in the context of a Bar Association, whose primary contact with most of its members is the exaction of fees, the exaction of fees *is already* the least restrictive form of contact with its members. Thus, where money only is concerned, there is no need to address less restrictive alternatives. By contrast, this case involves not

only the expenditure of money on the required classes, but the expenditure of time and attention, which petitioners believe to be, qualitatively, more intrusive.

Petitioners' point might be better illustrated by reference to this Court's recent decision in *Board of Regents of the University of Wisconsin System v. Southworth, supra,* 120 S.Ct. 1346 (2000). This Court held that the University could use student fees to fund political speech as long as forum-neutrality was maintained. (*Id.*, at p. 1350.) There is, as in *Keller,* no mention of less restrictive alternatives to the exaction of fees. But again, the exaction of fees is already the least restrictive alternative. Would the *Southworth* case be different if the University further required the students to *attend* the political speech they funded? Petitioners believe so. Would an analysis of less restrictive alternatives be called for? Petitioners believe so.

Finally, one might note respondents' claim that petitioners' argument about the least restrictive alternative is hollow. According to respondents, the *prevention* of bias, substance abuse, and emotional distress are germane to the practice of law and protection of the legal consumer, and there is no alternative less restrictive than anticipatory classes in these subjects. While accusing petitioners of missing the point, it is respondents who fail to grasp the matter: the threat of punishment of malefactors is an effective form of *prevention*, which has the further advantage of *not* punishing those who practice law properly and competently, and who value their freedom too much to brook the officious interference of government.

CONCLUSION

The instant case presents several important First Amendment questions in a new, if not unique, context. These questions are *not* answered, or not answered definitively, by established principles of law. For the reasons stated in this brief and in the petition for a writ of certiorari, that petition should be granted.

Dated: July 26, 2000

Respectfully submitted,

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